

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3411 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and
MR.JUSTICE A.L.DAVE

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

RAYMON GLUES & CHEMICALS

Versus

UNION OF INDIA

Appearance:

MR PARESH M DAVE for Petitioners
MR KETAN A DAVE for Respondent No. 1
MS AVANI S MEHTA for Respondent No. 2
NOTICE SERVED for Respondent No. 4

CORAM : MR.JUSTICE B.C.PATEL and
MR.JUSTICE A.L.DAVE

Date of decision: 17/03/99

ORAL JUDGEMENT

M/s. Raymon Glues & Chemicals engaged in the business of manufacturing of Di-calcium phosphate having a factory was being subjected to the provisions of Central Excise Act. The respondent classified the Di-calcium phosphate manufactured by the petitioner under

Chapter 28 of the Central Excise Tariff Act, 1985 (hereinafter referred to as 'the Tariff Act') though the same is classified under Chapter 23 of the Tariff Act by Customs, Excise & Gold (Control) Appellate Tribunal whose decisions are final by virtue of section 35C(4) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act'). The grievance voiced by the petitioner is that despite the decision of the Tribunal which has become final, the Central Board of Excise and Customs (hereinafter referred to as 'the Board'), by issuing circular vide Annexure 'D', has tried to nullify the effect of the decision of the Tribunal which according to the petitioner, amounts to indirect legislation by circulars. The subject matter of the circular dated 3.3.1997 issued by the Board under section 37-B is produced at Annexure 'D'. It was represented to the Board that there is no uniformity in the classification of Di-Calcium Phosphate of animal feed grade for the purpose of levy of Central Excise Duty in the schedule to the Tariff Act. It was represented that in some Commissionerates the product is classified under heading 23.02 whereas in some other Commissionerates under heading 28.35 of the Tariff Act. In para 9 of the circular, the Board ordered that DCP of animal feed grade (IS: 5470-1969) shall be classifiable under heading 28.35 of the Tariff Act. According to the petitioner, Chapter 23 refers to Residues and Wastes from the Food Industries; prepared animal fodder, which includes products of a kind used in animal feeding, not elsewhere specified or included, obtained by processing vegetable or animal materials to such an extent that they have lost the essential characteristics of the original material, other than vegetable waste, vegetable residues and by-products of such processing. Heading 23.02 under sub-heading 2302.00 gives description of goods as "preparations of a kind used in animal feeding, including dog and cat food". So far as Chapter 28 is concerned, it refers to inorganic chemicals, organic or inorganic compounds of precious metals, of rare-earth metals, of radioactive elements or of isotopes. Sub-heading 2835.00 under heading 28.35 gives description of goods as "Phosphinates (hypophosphites), Phosphonates (Phosphites); Phosphates and Polyphosphates."

2. Mr P M Dave, learned Advocate submitted that in view of the orders passed by the Tribunal, the circular requires to be quashed as by that circular, the Tribunal's judgment and order cannot be set aside, more particularly, in the instant case, when against the order of the Tribunal under Section 35L of the Act, statutory appeal being Civil Appeal No.2076/98 was preferred which

has been dismissed by order dated 5.11.1998 by the Apex Court.

3. The Commissioner (Appeals), Ahmedabad, followed the decision in the case of M/s. Punjab Bone Mills and M/s Protinkem v. Collector of Central excise, Chandigarh, reported in 1988(39) E.L.T. 389(Tribunal), wherein it was held that Di-Calcium Phosphate (D.C.P.) manufactured is classifiable under sub-heading 2302.00. He took the view that the product is classifiable under heading 23.02 and not under any other heading or sub-heading. The Commissioner (Appeals) has taken the view that the product is animal feed. The decision rendered by the CEGAT in case of Punjab Bone Mills (supra) is placed on record vide Annexure 'B', at page 25 of the petition. Before the Commissioner (Appeals), the necessary material was produced and as the product of Di-Calcium Phosphate which was confirming IS: 5470-69 namely; animal feed grade under the old Central Excise Tariff Clarification issued by the Board, the CEGAT's decision in the case of Punjab Bone Mills (supra), assessment of other Commissionerates etc, the Asstt. Commissioner's order was set aside and the appellant's appeal was allowed by the Commissioner (Appeals). This decision was also considered by the CEGAT's West Regional Bench at Bombay in appeal preferred against the present petitioner by the Commissioner of Central Excise, Baroda. The product was held as classifiable under heading 23.02 by the Tribunal. It was pointed out that the classification by the respondents claiming under heading 23.02 has been considered in favour of the present petitioner. The product was animal feed grade. It was correctly classified under heading 23.02. Reliance was placed on the decision reported in 1994 (70) E.L.T. 234 (Tribunal) where the Tribunal has held that DCP is classifiable under heading 2302 and not under Chapter 31 of the Tariff Act. Before the Tribunal reliance was placed on the Apex Court's decision in the case of Sun Export Corporation v. Collector of Customs, Mumbai, reported in 1997 (93) ELT 641 for the proposition that the classification of DCP animal feed grade would be justified considering the material as cattle feed. Considering the material and the law laid down by the Apex Court and the views expressed by the Tribunals, the Tribunal in the instant case pointed out, that the classification of DCP animal feed grade under heading 23.02 has been confirmed by the Tribunal in more than one of its decisions consistently. Thus, the Tribunal, opined that there is no reason to interfere with the conclusion of the Commissioner (Appeals) wherein it is held that the goods in question are correctly classifiable under sub-heading 2302.00 of

the Tariff Act. This decision was carried in appeal before the Apex Court. As we have pointed out earlier, the decision of the Tribunal has been confirmed.

4. The question now to be considered by the court is that in view of such a situation, can the Board be permitted to issue a circular to nullify the effect of the decision of the Court ? Mr Dave submitted that the Division Bench of this Court in the case of Indichem v. Union of India, reported in 1996 (88) E.L.T.35 (Guj.), had an occasion to consider issuance of circular which would make the decision rendered by the Tribunal ineffective. In paras 7 and 8, the Court observed as under:

"It appears that the trade notice at Annexure 'C' was accepted by all concerned, till annexure 'D'; came to be issued. Learned Advocate contended that by issuance of this trade notice, the Board has exceeded its limit and should not have sit in appeal over the decision rendered by the Tribunal. It was open for the department to move either the High Court or the Hon'ble Supreme Court to get the correctness decided, but having not done so, the effect must be given to the decision rendered by the Tribunal. Learned Advocates have placed reliance on the decision of the Apex Court in the cases reported in AIR 1961 SC 182 and AIR 1992 SC 711.

8. Section 37B of the Act reads as under:

"37-B. Instructions to Central excise Officers:

The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods issue such orders, instructions and directions to the Central Excise Officers as it may deem fit, and such officers and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the said Board:

Provided that no such orders,
instructions or directions shall be
issued,

- (a) so as to require any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner; or
- (b) so as to interfere with the discretion of the Collector of Central Excise (Appeals) in the exercise of his appellate functions"

This section empowers the Board to issue circulars for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods. Certainly, this section does not authorise the Board to issue directions which is contrary to the decision rendered by the Tribunal. Mr Ajmera, learned advocate could not point out anything which would suggest that the Board has such powers or that the Board was justified in issuing such circulars. It may be that the Board may not be in agreement with the view taken by the Tribunal. Then in that case, the Board may carry the matter in appeal, but once the decision has become final by issuing circular, the decision rendered by the Tribunal cannot be made to be nugatory."

Thus, section 37B does not empower or authorise the Board to issue directions which are contrary to the decision rendered by the Tribunal. It may be that the Board may not be in agreement with the views expressed by the Tribunal, then in that case, the Board may carry the matter in appeal. But once the decision has become final by issuing circular the decision rendered by the Tribunal cannot be made to be nugatory. The Board cannot use its authority or powers in issuing circulars in a manner which may have ultimate effect of nullifying the decision of CEGAT as if taking the order in Appeal and reversing the order, exercising the powers, as if it is sitting as Apex Court. In the instant case, the Apex Court has confirmed the views expressed by the Tribunal.

5. Mr Patel, learned Advocate appearing for the respondent submitted that before the Tribunal, the contention was raised but the Tribunal stated that for the first time, it cannot be raised and more particularly when that aspect would require examination of facts. He submitted that the circular is issued for the reasons indicated in the preamble of the circular itself. We are not able to agree with the contention raised by Mr Patel

for the simple reason that the Tribunal not in one but more than one decisions, has given positive finding that entry under sub-heading 2302.00 under heading 23.02 relates to Preparations of a kind used in animal feeding, including dog and cat food. Preparation of food of a kind used in animal feeding including dog and cat food would be covered by sub-heading 2302.00 and under heading 23.02. There is a positive finding then there is no need to have a negative finding when the product is not covered by heading 28.35 or under any other sub-heading.

6. In view of what we have stated hereinabove, the Special Civil Application is allowed. The impugned circular Annexure 'D' No.47/1/97-C dated 3.3.1997 is quashed and set aside. Rule made absolute.

....
msp.